United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7347

United States Court of Appeals

FOR THE SECOND CIRCUIT

JAMES WYPER, JR.

vs.

PROVIDENCE WASHINGTON INSURANCE COMPANY

AN APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF PLAINTIFF-APPELLANT

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STATEMENT OF THE ISSUES

In plaintiff's suit against a former employer for breach of contract in failing to award a pension due to incapacitating alcoholism, did the trial court err in directing a jury verdict for defendant, in any of the following respects:

1. Where it did not view the evidence and reasonable inferences therefrom in a light most favorable to plaintiff?

2. Where it required plaintiff to prove that no honest tribunal could reach any other decision, thus vitiating the contract under which defendant had little or no discretion?

3. Where the court in a diversity case chose to use a Fifth Circuit extrapolation of New York law, rather than the law of the state of the forum, Connecticut, which would have produced a different outcome?

4. Where it chose to use Connecticut law regarding the avoidance of a release signed by plaintiff in Rhode Island?

5. Where it imposed upon plaintiff as part of his direct case the burden of proving the involuntariness of the release pleaded as a special defense?

6. Where it failed to consider, in addition to intoxication, another ground for avoidance of the release, being the unfair and oppressive advantage taken by an employer of an employee's mental weakness?

7. Where its direction came during defendant's case and before plaintiff could cross-examine witnesses who, a pre-trial pleading indicated, might strengthen plaintiff's case?

STATEMENT OF THE CASE

Plaintiff instituted this diversity action in January, 1973 based on defendant's breach of contract in failing to award him a pension based upon an incapacitating disease, alcoholism. The case was tried on May 20-22, 1975 to a jury of six before Honorable M. Joseph Blumenfeld. In response to defendant's motion for directed verdict at the close of plaintiff's case, the court allowed plaintiff to reopen his case to present at that time evidence in avoidance of a "release" defendant had set up as a special defense. Plaintiff protested but did so and then rested. Defendant put on as its first witness its former Chairman of the Board whom plaintiff's counsel then cross-examined. (R.A.) Then, without hearing further from plaintiff, and in spite of plaintiff's strong evidence of incapacitating alcoholism of which defendant knew, the court directed the jury to return verdict for defendant on two grounds. (App. 3a-5a) Plaintiff now appeals from that verdict.

Plaintiff was an executive with a Hartford insurance company who was induced at age 48 to change his employment and to become president of defendant. Prior to the change in September 1966, and the only part of the new relationship confirmed in writing, defendant agreed he would be credited under its pension plan with past prior service from September 1, 1940. Defendant's pension plan provided both for regular retirement and for retirement after ten years service if an employee becomes "physically or mentally incapacitated to fill his or her position". (Exh. 1, 2, 6)

Sometime in 1967, plaintiff developed a "drinking problem" which was noticed both at home and on the job. By 1968, he was drinking heavily before and after work and at noon. Three former officers testified that his drinking became a topic of conversation and concern among some of defendant's officers, and cited some specific instances which tended to show impairment of his capacity to be president. He drowsed at directors' meetings and just before the April 1968 meeting,

several directors asked him about his drinking problem. After the meeting several days later, the Chairman of the Board told him he was not fit to run the company, and "encouraged" his resignation. His drinking during the next month became worse and he was in bad condition and needed to drink to function at all. He consulted a doctor on April 25th, who found an enlarged and damaged liver and diagnosed him as an alcoholic for at least six months or more, and opined his legal and business acumen was impaired.

Just prior to (or after?) the May 7, 1968 directors' meeting, the Chairman prepared letters of resignation and release for plaintiff's signature. At the meeting the Board accepted his resignation and resolved that he would receive three months severance pay if he signed the release. (Exh. 7 & A) After the meeting plaintiff, who had drunk before work and before the meeting, returned to his office, pulled out a bottle, and quickly had several drinks. He did not remember the rest of the day or signing the letters placed before him by the Chairman. The release specified salary and severance pay, but made no mention of pension rights. (App. 2a) Plaintiff was age 50 and his disability pension would have been $20,000 annually. Plaintiff never intended to release his pension rights. A majority of defendant's pension board consisted of directors who obliged plaintiff's "resignation" and knew of his "problem".

After termination, plaintiff asked a director about his situation and his pension but got nowhere. Plaintiff and his wife returned to Hartford, where on June 3rd he was examined by another doctor, who found him a chronic alcoholic for a minimum of two or three months and probably not competent to make responsible decisions or run a company. He was sent to a psychiatric institute in Toronto to dry out. Over the next months and years, plaintiff was in and out of various institutions for alcoholism, and his wife divorced him. In response to Request for Admissions, defendant acknowledged that alcoholism is regarded by the medical profession as a disease.

ARGUMENT

SUMMARY: By changing employment and then continuing in it, plaintiff obtained from defendant a contractual right to

whatever pension plan applied to him at the end of his employment. Defendant retained no discretion over the awarding of a pension which could operate to undermine this contract, and had a duty fairly to evaluate any pension claim. Plaintiff became an alcoholic months before his employment with defendant was terminated, and presented at trial abundant evidence from doctors and officers of defendant of his disease and its incapacitating effects on his continuation as president. Without any good faith evaluation of plaintiff's problem of which they had knowledge, defendant's directors not only forced his resignation, but also caused him on his final day to sign an alleged release of valuable but unspecified rights, while he was either intoxicated or in weakened mental condition. In directing a verdict during the defense case, the court viewed the evidence and inferences from it in the light most unfavorable to plaintiff, imposed "administrative" standards of proof which both disregarded the existing pension contract and were otherwise incorrect, adopted the wrong choice of law in diversity cases as to the controlling state law on the merits as well as on burden of proof, obliged plaintiff to disprove a special defense as part of his direct case, overlooked a major ground for avoidance of the release, and prevented a strong breach of contract case from even being considered by the jury.

I. The Court did not view the evidence and reasonable inferences therefrom in the light most favorable to plaintiff when it directed a verdict for defendant.

a. *Background, and existence of a contract between the parties for a pension:* Defendant admitted the following allegations of the complaint (App. 1a-2a; R. 11, 12): In 1966 and for many years prior, plaintiff had been an employee of Hartford Fire Insurance Company and had attained an executive position. In September 1966 he left such employment to become executive vice-president of the defendant, with the understanding that he would shortly thereafter become defendant's president. At the time he joined defendant, and as a further inducement to his change of employment, defendant agreed that he would be credited under its pension plan with past prior service from September 1, 1940. Defendant then

had a pension plan among the provisions of which were the following:

> ". . . any employee who, after being ten years continuously in the service of the company, shall become physically or mentally incapacitated to fill his or her position may be retired by a majority vote of the Pension Board from active service. Service with other similar institutions may be considered as with this Company for the purpose of calculating the term of service."

Defendant only says it will evaluate his rights when he reaches age 65, which will be on October 27, 1982.

Trial proof brought out the following on which there is no apparent dispute. Through the efforts of a New York executive personnel agency in the summer of 1966, plaintiff was solicited to assume a top position defendant was trying to fill. He was then 48 years old and was within several months of service necessary for retirement and pension. He had several meetings in Providence with members of defendant's Board of Directors, and reached an agreement with its then president, Roy E. Carr, which was approved by the Board. This agreement covered salary ($40,000 annually), life insurance, medical insurance and moving expenses but was not contained in any written employment contract. (TR 18-23) The only written understanding was in the two letters (Exh. 1 and 2) to him from Mr. Carr dated September 26 and 27, 1966; the latter confirmed the former which said:

> "This will confirm our agreement, at the time you joined the [defendant] that you be credited under our Pension Plan with past prior service from September 1, 1940."

Plaintiff's employment was terminated on May 7, 1968 (Exh. 4, 7).

There was clearly a contract between the parties as to a pension, and the trial court relied on a case so holding, *Mathews v. Swift & Co.*, 465 F.2d 814 (5th Cir. 1972). Thus, the legal issue at trial was whether defendant breached its contract with plaintiff (and/or acted in bad faith) by failing to award him, not a regular retirement pension at age 65, but rather a "disability" pension of half his annual salary because he was

"physically or mentally incapacitated to fill his position" at the time of his termination. The resolution of this issue depended on the resolution of the following factual questions:

1. Did plaintiff become an alcoholic while in defendant's employ?

2. Did his alcoholism probably incapacitate him from filling his position *as President* (not *any* position)?

3. Did defendant know of such incapacity by the time of plaintiff's termination on May 7, 1968?

4. Did defendant act in bad faith or arbitrarily in terminating plaintiff under the circumstances without a "disability" pension?[1]

Plaintiff assumed the burden of proof on these questions. Essentially he claimed that, although defendant could terminate him at will, it could not deny him a disability pension if by the time of termination it had reason to know that he was incapacitated from continuing his duties as president. Plaintiff's evidence on these claims was not merely sufficient, but was clear, indeed overwhelming. Nevertheless, the court applied incorrect standards and directed a verdict for defendant one witness after the close of plaintiff's case.

The Connecticut Supreme Court has repeatedly made statements of which the following are more recent examples:

> " 'The court's action in directing the verdict for the defendants can be sustained only if the jury could not reasonably and legally have reached a conclusion other than in . . . [her] favor. Directed verdicts are not favored and should be granted only when the jury could not reasonably and legally reach any other conclusion.' In reviewing the action of the trial court, in first directing

[1]This question restates in large measure the three prior questions, is a mixed question of law and fact, and may not have to be proven by plaintiff, depending upon the proper legal standard to be applied. This question also relates to another mixed question of law and fact involving the role, if any, of defendant's Pension Board. Also to be later considered is the alternate ground for directing a verdict — that plaintiff had not avoided a "[illegible]case" of his rights.

and thereafter refusing to set aside the verdict, we consider the evidence, including inferences which reasonably may be drawn from this evidence, in the light most favorable to the plaintiff." (citations omitted) *Pinto v. Spigner*, 163 Conn. 191, 192-3, 302 A.2d 266 (1972).

"The occasions upon which a nonsuit may properly be granted are rare. Such a disposition of a case may be resorted to only when a plaintiff has failed to make out a prima facie case, that is, when the evidence produced by the plaintiff, if fully believed, would not permit the trier in reason to find the essential issues on the complaint in favor of the plaintiff." (citations omitted) *Minicozzi v. Atlantic Refining Co.*, 143 Conn. 226, 230, 120 A.2d 294 (1956), speaking of statutory motion for nonsuit at close of plaintiff's case.

A case should be submitted to the jury if the evidence is sufficient to require a submission under the law of the state where the federal court is sitting. *Colbert v. Katy Taxi Inc.*, 413 F.2d 841 (2nd Cir., 1969), and cases in Anno. 10 ALR Fed. 451, 464-5.

b. *Substantial evidence of defendant's knowledge of incapacitating alcoholism at time of termination: Written Admissions:* In answer to requests for admissions, defendant admitted that alcoholism is regarded as a disease by the American Medical Association and is widely regarded by the medical profession as a disease or illness which is treatable. (R. 24) This admission permits the inference that alcoholism is a disease or illness which can incapacitate like any other disease or illness — and is *not* a "moral weakness."

Defendant also admitted "that during the period January, 1968 to May, 1968, plaintiff appeared to some persons to have problems associated with the use of alcohol". In answers to interrogatories, it admitted that plaintiff was asked to resign on May 7, 1968 by the Board of Directors, and was encouraged to resign on the same date by the Board Chairman, Claude R. Branch, who caused to be prepared two letters, including one of resignation, signed by plaintiff on that day (Exh. 11). The "resignation" letter (Exh. 4) was to take effect at the pleasure of the Board; the Board accepted it that very day (Exh. 7). This permits the inferences that plaintiff was forced

to resign and that defendant's Board considered him unfit to continue *as president*. This latter inference is also supported by a confidential internal memorandum of June 2, 1972 (Exh. 8) from the president who succeeded plaintiff, which indicated regarding Mr. Wyper's "resignation" that "one problem was alcohol, and perhaps in court this could be construed as a disease". The significance of the former inference is shown by the disclosure of a memo in defendant's file of unknown authorship which said in part, "Wyper has a more valid claim if fired than if he resigned". (Exh. 9). Admissions and pertinent parts of exhibits were read to the jury. (TR 16)

Exhibit 3 revealed an eleven-man Board of Directors, and a seven-man Pension Board. Plaintiff was on both, as were Directors Branch, Carr, Lebor and McLeod. In view of the Board's action terminating plaintiff, there is an inference that any application for a disability pension to defendant's Pension Board dominated by four directors would have been futile. Furthermore, information about plaintiff's condition and performance known by the Board of Directors was "known" by the Pension Board. 19 *Am. Jur.* 2d, Corps. § 1263.

Knowledge of Officers and Directors: The other two members of the Pension Board on May 7, 1968, were Walter Perry, Jr., a senior or executive vice-president, and Joseph S. Morris, vice-president and comptroller. Both these men had left defendant's employ and were subpoenaed by plaintiff. Mr. Perry frequently attended directors' meetings, and "on a number of occasions Mr. Wyper appeared to doze off, that is, he was apparently asleep". Matters of importance to the company were being discussed. On an occasion during the last few months of Mr. Wyper's employ, Mr. Perry spoke to him about a drinking problem:

> "I told him that I had been informed that there was considerable talk in the company to the effect that he was drinking during office hours to an extent which was likely to bring discredit to the company. I told him I was concerned about this." (TR 75-78)

Mr. Morris noticed signs of excessive use of alcohol on several occasions during meetings in 1967 and the first four

months of 1968. Mr. Wyper smelled of liquor, dozed on occasion, and his face appeared unusually flushed. (The court struck as an "opinion" Morris' statement that Wyper had the symptoms and appearance of someone who had a drinking problem (TR 81, 82). On one occasion, he had an appointment in the afternoon to review financial results so Wyper could report to the Board the next day; Wyper came into the building at 7:00 to 8:00 p.m. in an intoxicated condition and they were unable to go over the figures. (TR 83-85) (The Court then excluded a question: did Mr. Wyper's drinking problem, as you observed it, impair his capacities to operate the company as president? TR 86[2] They went over the figures the next day; Wyper's face was flushed, he had the odor of alcohol on his breath, and appeared forgetful. (TR 92) This was during one of the first four months of 1968. He was present at conversations or meetings with senior officers in the company (naming four) at which Wyper's drinking problem was discussed. (IV TR 2, 6, 7; R. 5)

Edmond P. Magner, a former employee who was secretary and underwriting officer in May, 1968, also testified under subpoena for plaintiff. During a marketing and underwriting meeting in mid-1967, Wyper fell asleep several times due to drinking; his snoring was bothersome. He was a fairly heavy drinker, and his drinking problem was a constant subject of discussion with company officers, reluctantly naming four.

> "Q. And did these discussions concern his effectiveness in relation to his drinking?
>
> A. I think in the sense that any chief executive who obviously has a drinking problem, it has to affect his effectiveness." (TR 149-157, esp. 154)

From the foregoing, company officers knew for some months, back into 1967, of plaintiff's drinking problem, and two officers were members of the Pension Board itself. Inferences of directors' knowledge flow from his dozing at directors' meetings, from plaintiff's flushed appearance, and probably

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[2]This ruling was erroneous but need only be considered if this Court disagrees with the other new trial grounds claimed in this brief.

from the odor of alcohol. Such dozing or sleeping at business meetings, forgetfulness, and inability to go over figures due to intoxication the day before a directors' meeting are direct evidence of incapacity to continue *as president*. Furthermore, since a company president necessarily affects the company both internally and externally, there are reasonable inferences that a president with a drinking problem has an adverse effect on employee morale and company image, and that his capacity to continue as president becomes very dubious. A president cannot hide such a problem and cannot remain effective indefinitely; defendant's Board recognized this by obliging plaintiff to resign.

One further point on directors' knowledge: Mr. Branch admitted on cross-examination that one of the other directors, Mr. McLeod, told him Wyper was drowsing at meetings and that McLeod and some other directors had gone to Wyper and talked to him about it. He said Mr. Wyper said he had a drinking problem, but it was under control. This was in early April. (TR 274-277) Thus several directors knew of a drinking problem in April 1968 (under circumstances which confirm part of Mr. Wyper's own testimony). This knowledge combined with the *timing* of plaintiff's obligatory resignation create a strong inference that defendant had determined plaintiff was no longer capable of serving as president.

Medical Evidence of Alcoholism: William J. H. Fischer, M.D. of Providence testified by deposition. (R. 8) He had excellent qualifications, was a practicing internist for 26 years, and had special experience regarding alcoholism. Mr. Wyper consulted him on April 25, 1968, gave a history of drinking too much, and admitted to being in the heavy dependency state. This history accorded with physical findings — very nervous and with an enlarged liver. Plaintiff was an alcoholic. (1-7) His opinion was that Wyper was dependent on alcohol and "I am sure that in the condition he was in, he wouldn't be able to function well on any job . . . if he was drinking". His wife had consulted the doctor about this problem in September 1967. (9) Based on objective findings, "I think anyone would agree that with a liver enlarged as it was, it [alcoholism] is clearly a matter of most certainly six months or more." (10)

In his opinion Wyper's physical and mental function would have been to some extent impaired, by his own admission he was physically or mentally incapacitated, and there was nothing in the findings or diagnosis to indicate to the contrary. He saw him again on May 25, 1968, and he said he was drinking less. (10-12) The SGOT transminase test was almost double (74) the norm, indicating the liver is being damaged by drinking. He thought plaintiff impaired his health as well as his legal and business acumen. (26-28)

Edward Nichols, M.D. also had excellent qualifications, had been an internist in Hartford since 1946, and had experience with alcoholic problems. On June 3, 1968 he saw plaintiff who looked tired and nervous, and had a marked tremor of the hands, and an alcoholic appearance. (TR 93-98) On examination his liver was definitely enlarged to palpitation, and a test showed interference with the function of the liver as a whole. His diagnosis was acute chronic alcoholism, a fatty liver. (TR 99-101) From physical examination alone (without any history), he must have been drinking excessively — and was a chronic alcoholic — for a minimum period of two or three months. (TR 104-5, 129) As to history, plaintiff had been drinking too much for a long period of time and, as to business, he was not depending as much on himself as "on other sources — his secretary, and so forth, in keeping abreast of some of the things that were going on". (TR 102) Assuming a job that required difficult decisions and responsibility, and based upon his findings and examination on June 3, he opined plaintiff would not on June 3rd be competent to run a company. (TR 105-7) Adding Wyper's history, he opined, "he would not have been able to have done a good competent job a month previously from my examination". (TR 108-9) The usual alcoholic attempts to cover up for himself, to minimize his consumption, to deny he's an alcoholic, and "to see his problem as something he can handle if he really wants to". (TR 109-111) Dr. Nichols recommended that plaintiff accept hospitalization, and Wyper went to the Clarke Institute of Psychiatry in Toronto. He needed to get over the toxic effects of acute alcoholism, become rehydrated, get away from alcohol entirely, etc. (TR 114-115) The doctor saw him again in his office on

December 2, 1968, and on December 5th he went to Silver Hill for alcoholism, and was again in the office in the same situation in March, 1969.

Plaintiff was at the Clarke Institute from June 10 to 21, 1968. Portions of its report are Exhibit 12, and those portions indicate, *inter alia,* a ruddy faced man, who used alcohol to relieve feelings of depression and tension; concentration and memory somewhat impaired, serum SGOT was 121 units, normal being 10-40 units, certain tests generally consistent with some loss of brain weight. Indicia of mental impairment thus furnished some inference for such impairment five weeks before. At the very least Clarke's report confirms what Dr. Fischer and Nichols found, as well as their discouraging views on successful treatment. (Fischer R. 8, p. 29; Nichols TR 126-7)

Testimony of Plaintiff and His Ex-wife: In view of defendant's knowledge, the medical evidence, Dr. Nichols' traits of the usual alcoholic, and the trial court's comment, "Now there is considerable evidence in this case which would permit a fact finder to find that he was disabled in carrying on his duties as president" (TR 169), only limited aspects of the testimony of plaintiff and his wife who divorced him in 1970 will be presented. Plaintiff said the Pension Board didn't function (24), his differences with director and major stockholder Swim and his travelling and entertaining duties caused him to drink (22-29), he stopped drinking in December 1967 (34), then resumed heavy drinking. Several days before the April directors' meeting, Directors Coffey, Livingston and McLeod asked him if he'd been drinking and taken any kind of drugs, and he said yes at lunch-time, and Librium. After the directors' meeting the following Tuesday, Mr. Branch told him he "was not in a position to run the company", "was not fit to run the company". He didn't do anything; McLeod said there was no choice; so he resigned at the May meeting. ". . . . they said you can resign, we will record it as a resignation, but I knew otherwise." During that last month his physical and mental condition was not good, he was depressed. After the May 7th meeting he went to his office and was drinking; he doesn't remember signing the letters that day. (TR 38-44,

49-51) During the last month he did not give 100% attention to his duties, he was out of the office a good deal. He was not mentally capable of running that Company during the last month. (IV TR 21, 22, 27, R. 4)

Florence Wyper said plaintiff's excessive drinking began in the Summer of 1967 and in the Fall of 1967 plaintiff's appearance changed; his face became puffy, his complexion turned purple, he had striations on his neck. (TR 131, 61) She spoke to Dr. Fischer. By 1968 he "was drinking most of the time when he was home. He drank before he went to work in the morning, he was drinking when he came home, he drank when he came home before dinner, and he drank after dinner". The morning drinking before work increased steadily, up to two or three drinks, and on going to work he appeared intoxicated. After February he would arrive home almost every night intoxicated. (TR 133-37) He drank prior to leaving the house to play tennis with Mr. Branch one Saturday morning, and came back in a short time. (TR 140-42) In the Spring of 1968 he was not able to do normal functions around the house; as to his mental capacity to make decisions affecting the family, "It got to the point we didn't ask him any more . . . .because his answers didn't make sense". (TR 146) Some days after the May 7th meeting, they went to Coffey's office "to find out if there was any possible way Mr. Wyper would be able to have a pension", and Coffey said "there's nothing," — only "three months severance pay." (TR 253, 257)

Furthermore, severe impairment of plaintiff's capacity to act as President, of his business judgment and acumen, can be strongly inferred from his signing at age 50 of a release (hereafter considered) of his rights including a pension worth about $20,000 per year, in exchange for three months severance pay.

c. *Lack of good faith and fairness of board of directors:* There are already admissions, plaintiff's testimony, and inferences to show plaintiff's "resignation" was not voluntary. Furthermore Mr. Branch candidly admitted that if plaintiff hadn't resigned, he would not have been reelected president. (TR 200-1) In short, plaintiff had no choice; he was going to be out of a job whether he resigned quietly or was fired more unpleasantly. However, it makes no difference if plaintiff was

fired with or without cause. He had no right to continued employment. What was wrongful about his termination, *whether voluntary or involuntary*, was that it came at a time when plaintiff was suffering from a disease which defendants knew probably incapacitated him from performing all his duties as president. Defendant corporation is chargeable with knowledge acquired by its officers or agents — or that which, by ordinary care, they could have known, especially if they received sufficient information to awaken inquiry. 3 *Am. Jur.* 2d, Agency §§ 273, 277; 19 *Am. Jur.* 2d, Corps. § 1263. In other words, defendant could get rid of plaintiff at any time — but it had to give him a pension if he qualified under its plan *at that time*. Defendant, however, failed to make a good faith or non-arbitrary determination whether he qualified for a pension.

At the time of deciding plaintiff was not fit to run the company and to oblige his resignation, defendant had two options. The first was the obvious, fair, good faith step of persons dealing with an illness, especially one which was affecting the performance of the chief executive officer — either discharge him quietly with a disability pension, or if there were any question about the extent of his condition *or* rehabilitating him, have him examined by a doctor. There is no indication in this case that any doctor examining Mr. Wyper in April 1968 would have reached conclusions different from Dr. Fischer, or Dr. Nichols a month or so later — that plaintiff was then and had for some months been alcohol dependent, and that his business acumen and capacity to make difficult decisions was impaired (the latter conclusion being confirmed by the on-the-job observations of at least three high officers). The other option was the one plaintiff selected: give plaintiff no choice but to resign, procure a release from a sick man on his final day, say nothing in it about a pension — and rationalize this conduct because the pension plan was generally a gratuity extended to the right employees but not owed to a disappointing president who had inflicted an alcoholic condition upon himself. Legal standards of good and bad faith will later be explored, but for now plaintiff certainly had considerable evidence reasonably to argue to a jury that defendant

took unfair advantage of a sick man, himself depressed and ashamed of his disease.

One last point here is that the directors who obliged plaintiff's termination, who failed to even seek a medical opinion, and who set the terms of the release, also controlled the Pension Board. Defendant's Pension System (Exh. 6) does not require a formal application to the Pension Board — and the law does not require a futile act anyway. Aside from plaintiff's testimony that such Board generally did nothing, it would be absurd to expect the Pension Board to take any action inconsistent with the way the Board of Directors "settled things". Shortly after May 7th, Mr. Wyper beseeched a director about a pension and received a flat "no". Because of the circumstances and the close identity between the two Boards and the inaction of the Pension Board, plaintiff submits there is no distinction to be made between them. The question is only whether the defendant, *through its Board of Directors,* acted fairly and in good faith towards plaintiff. The answer is that a large measure of bad faith is not only apparent but also clear once the circumstances surrounding the "release" are considered (Sec. IV).

d. *Trial judge took defendant's view of the evidence:* From the foregoing, it is difficult to understand how plaintiff has failed to prove his case to the satisfaction of the trier, let alone how he did not even get the right to have his case decided by a jury. The answer generally is that the trial judge took defendant's limited view of some cross-examination testimony (aside from applying stringent tests and burdens of proof later considered). He started (TR 279-80) with a supposed distinction between plaintiff's drinking which only impaired his capacity at times and "physical and mental incapacity to fill his position". This distinction ignores the general and specific testimony of three high officers, the knowledge of directors of a drinking problem, and the numerous inferences that can be drawn from this and other evidence, the foremost of which is that the Board's *timing* of the termination strongly indicates it determined plaintiff was incapacitated from continuing *as president* (and that no doctor's advice was even needed to verify the obvious). The judge then de-

termined that Doctor Fischer's testimony was "certainly inconclusive". This remark is incomprehensible. Even if the judge were permitted to consider the cross-examination, Doctor Fischer remained a firm and positive witness for plaintiff. Likewise incorrect is to sum up (TR 280) all Dr. Nichols' testimony to the effect "that it would be possible to have a different opinion" on plaintiff's incapacity two or three months before the doctor saw plaintiff. That it was "conceivable" or "possible" came on the court's own cross-examination of Dr. Nichols at the conclusion of defendant's cross-examination. (TR 127, 128) While Doctor Nichols maintained his opinion, how would a careful doctor be expected to answer leading questions from a judge as to a *possibly different opinion at a different point in time?* Any opinion has a possible difference which increases with time. Probabilities were not even asked by the court. Obviously, if plaintiff had to disprove all possibilities, let alone all possible opinions, he should never have come to court. No such legal burden rests on any party in any case, civil or criminal; yet even if it did, the jury should decide whether that burden was satisfied. The judge has in effect not only taken a view of cross-examination evidence most favorable to defendant but has applied a standard in a way that realistically precludes plaintiff from ever proving his case.

II. The Court erred in requiring plaintiff to prove as an element of his case the "no honest tribunal" test taken from a Fifth Circuit case, but plaintiff nevertheless proved such element as it should apply.

a. *General law:* Even without regard to definite contractual commitments between the parties in this case, the former split of authority as to whether private pension plans constitute mere gratuities or give contractual rights to employees has become a tide in favor of the latter position. 60 *Am. Jur.* 2d, Pen. & Ret. Funds, 74-76, 84; Anno: "Rights and liabilities as between employer and employee with respect to general pension or retirement plan", 42 ALR 2d 461, and later cases in ALR supplemental services, such as: *Taylor v. General Tel. Co.*, 20 Cal. App. 3d 70, 97 Cal. Rptr. 349 (1971 — even where later discharge of employee for cause); *Mugill v. Reuben H.*

Donnelly Corp., 62 Cal. 2d 239, 42 Cal. Rptr. 107, 398 P.2d 147 (1965 — no forfeiture of pension rights by going to work for competitor since such restraint is void); *Conner v. Phoenix Steel Corp.*, A.2d 866 (Del. Sup. 1969 — incentive to continuing better service and performance); *Atlantic Steel Co. v. Kichens*, 228 Ga. 708, 187 S.E.2d 824 (1972 — discharged employee had vested right in early retirement pension); *Evo v. Jomac Inc.*, 119 N.J. Sup. 7, 289 A.2d 551 (1972 — plans governed by ordinary contract principles); *Russell v. Princeton Laboratories, Inc.*, 50 N.J. 30, 231 A.2d 800 (1967 — right no less contractual than if plan expressly bargained for, and employee's leaving due to contact with materials harmful to health was not voluntary); *Levitt v. Billy Penn Corp.*, 219 Pa. Super. 499, 283 A.2d 873 (1971 — plans to be liberally construed in favor of employees); *Jacoby v. Group Harbor Chair & Mfg. Co.*, 77 Wash. 2d 911, 468 P.2d 666 (1970 — continued employment constitutes consideration for promise to pay pension). The modern rule is well and succinctly put by the Oregon Supreme Court: An employer becomes liable under a pension plan if it is shown that,

> "(1) The employer has adopted a plan to pay retirement benefits; (2) the employee knows of the plan and (3) the employee is eligible for benefits under the plan". *Rose City Transit Co. v. City of Portland*, 533 P.2d 339, 342 (Or. 1975).

Clearly plaintiff produced evidence demonstrating all three elements — plus his original contract.

Even a case representative of the outdated position that the employer can grant or withhold pension benefits at its pleasure indicates this is so only where the employee did not enter employment under any expectation of pension benefits. *Neuffer v. Bakery & Confection Workers International Union*, 193 F. Supp. 699 (D. C. Dist. Col. 1961 — applying Illinois law). And where there is a voluntary plan, discretion of the company must still not be arbitrary, capricious, fraudulent, or in bad faith. *Lano v. Rochester Germicide Co.*, 261 Minn. 556, 113 N.W.2d 460 (1962); *Smith v. New England Tel. & Tel. Co.*, 246 A.2d 697 (N.H. 1968); *Teren v. First National Bank*, 412 P.2d 794 (Or. 1966). Where a plan providing benefits only

to those who "in the opinion of the officers of the company" had been loyal and faithful to the company for more than ten years, the determination of faithful service could not be based on mere whim or caprice amounting to an evasion of responsibility. *Wilson v. Rudolph Wurlitzer Co.*, 48 Ohio App. 450, 194 N.E. 441 (1962).

b. *Fifth Circuit case inapplicable:* There is a recent case on which the court heavily relied, *Mathews v. Swift & Co.*, 465 F.2d 814 (5th Cir. 1972) which combines the old and new positions in an unclear and harsh way. In accordance with better and recent trend of authority, the Fifth Circuit said that private non-contributory pension plans create contractual obligations. Then, relying on a New York case, it went on to say the claimant had the burden of proving the ruling of the "pension board" was motivated by bad faith or arrived at by fraud or arbitrary action. But the application of this "administrative" test was then *in dictum* framed more harshly in language and effect than even the older gratuity cases on which defendant relied.

Significant differences and problems make *Mathews* inapplicable factually and legally to the case at bar:

1. Plaintiff there claimed the only issue was whether he was permanently and totally disabled as a result of a heart attack, but even on this narrow issue his medical evidence did not support him.

2. The plan only required he "become disabled, other than temporarily, so as to be unable to perform the duties *of any job* available for him at the unit where employed" (emphasis added), not "to fill his or her position", i.e. the duties of *the* job as president.

3. The plan made the administrative function of Swift's Board clear; but here only the word "may" is used.

4. But even assuming "may" here subsumes the broad discretion provided in Swift's plan, the court in *Mathews* pointed out that a judge or jury *could* apply definite standards *even including the degree of disability* (i.e., unable to perform the duties of any available job) but that,

> "When . . . we reach the requirement that the employee 'become disabled, other than temporarily', the standard is so indefinite that a judge or jury's decision could hardly be substituted for that of the Pension Board without doing violence to the provision that all decisions as to the availability of a disability pension lie 'in the sole discretion of the Pension Board'. What is meant by 'other than temporarily'?" *Id.* at 820
>
> (This distinction supports plaintiff's position.)

5. The court said it was *unclear* whether Swift's Board had decided *Mathews'* claim on the merits, and held that it was error for the district court to have decided he was entitled to a pension. Consequently *Mathews* is inapplicable to the instant case where the Board of Directors discharged plaintiff without pension.

6. The court below nevertheless seized on this erroneous dictum:

> "Mathews has the burden of proving such a clear case of permanent disability that no honest tribunal could reach any other decision and the burden of proving that any other decision is or would be arbitrary, fraudulent, or in bad faith,"

even though the *Mathews* court then appeared to retreat to firmer administrative law ground:

> ". . . if the Pension Board had made no decision that it could not fairly and in good faith decide against Mathews upon the evidence presented before the Court." *Id.* at 821

7. The New York case cited, *Gitelson v. DuPont*, 17 N.Y.S. 2d 46, 268 N.Y.S. 2d 11, 215 N.E. 2d 336 (1966), applied only the usual administrative rule (motivated by bad faith, or arrived at by fraud or arbitrary action) to very different circumstances of a court's refusal to interfere with the discretion in the pension board's determination against a stockholder employee who was discharged for failing to explain suspicious circumstances and who later pleaded guilty to larceny involving the manipulation of customers' funds. *cf. Barbaree v. Independent Life & Acc. Ins. Co.*, 481 F.2d 1280 (5th Cir. 1973, *per curiam*, applying usual rule citing *Mathews*).

If *Mathews* can be used in this case at all in view its different facts and plan, it should not be used to produce a harsher test and result for employees than company discretion under the older voluntary plan cases permitted. This is especially true where Rhode Island law indicates that an employer must act *in good faith* in discharging an employee where the employment contract provides for performance to the satisfaction of the employer. *Hanaford v. Steven & Co.*, 39 R.I. 182, 98 Atl. 209 (1916).

Defendant was at least obliged to determine fairly, in good faith, or without arbitrariness or fraud that plaintiff was not mentally or physically incapacitated from performing his duties as president. Annos. 42 ALR 2d 461, sec. 7; 81 ALR 2d 1066 sec. 8. Bad faith is the opposite of good faith and generally implies some design to deceive or mislead another or a neglect or refusal to fulfill some duty or contractual obligation, sometimes prompted by some selfish or sinister nature. An arbitrary determination is one not supported by fair, solid or substantial cause; or at pleasure, without reason. Black's Law Dictionary (4th Ed.) 176, 134. Defendant's discretion in awarding or denying a pension should involve a fair, honest, good faith exercise of judgment, and have been based upon substantial reason. It could not be contrary to the probable facts and it could not be a failure to consider the matter responsibly. *McHorse v. Portland General Electric Co.*, 521 P.2d 315, 319 (Or. 1974); *Bos v. United States Rubber Co.*, 100 Cal. App.2d 565, 224 P.2d 386 (1950); *Coats v. General Motors Corp.*, 11 Cal.2d 601, 81 P.2d 906 (1938); *Montgomery Ward & Co. v. Reich*, 131 Colo. 407, 282 P.2d 1091 (1955).

c. *Plaintiff proved arbitrariness or lack of good faith:* The "explanation" for the decision of the court below is that it adopted the *Mathews* dictum of "no honest tribunal" in a way that made plaintiff not only prove his case but also disprove any reason supporting defendant's case. The burden on plaintiff was magnified to oblige disproof of every reasonable *possibility* defendant's Board might have considered. What is completely overlooked in formulating this heavy burden is that no Board of defendant even reasonably and responsibly considered whether plaintiff might be entitled to a "disability"

pension. What is further overlooked is that plaintiff's contract has in the process been turned into an illusion.

After *Mathews*, the Fifth Circuit again had occasion to consider the standards to be applied in a case involving denial of a disability pension. In *Marsh v. Greyhound Lines, Inc.*, 488 F.2d 278 (5 Cir., 1974), that Court, "(r)ecognizing that direct evidence of bad faith could easily be concealed in the (defendant's) internal procedures and the (defendant's officers') private opinions", expressly adopted the plaintiff's contention that:

> "bad faith may be established not only by direct evidence, such as evidence of unreasonable requirements, *refusal to consider favorable information*, or the use of standards more strict than those applied to others similarly situated, but that *bad faith may also be inferred from an adverse decision which has no basis in fact*". 488 F.2d at 280 (emphasis added).

The Court further stated that the test to be applied upon defendant's motion for a directed verdict is whether

> "the evidence so strongly and overwhelmingly supports the conclusion that the decision had a factual basis that reasonable men could not decide to the contrary" *Ibid.*

That test, enunciated by the same court which decided *Mathews*, is the test which should have been applied by the court below. Not only did plaintiff show direct evidence of bad faith in the defendant's failure to consider evidence favorable to him, but also the record is devoid of any evidence showing a basis in fact for the defendant's "decision", this giving rise to an inference of bad faith. Under the *Marsh* test, it was incumbent upon plaintiff to make a *prima facie* showing of entitlement to disability retirement benefits. See *Rose City Transit Co. v. City of Portland, supra.* Once he had done so, however, it was incumbent upon the defendant to demonstrate a basis for failing to grant the pension. It was erroneous for the court below to require the plaintiff to prove lack of any basis for the defendant's decision, particularly since direct evidence of the defendant's bad faith could easily be concealed in its internal procedures and in its officers' private opinions.

Plaintiff had strong medical evidence before he was terminated, corroborated by more obtained shortly afterwards; defendant had no contrary opinion. Plaintiff was not on the mere threshold of his disease; it was noticed by his wife and at least one company officer back in 1967. Three former high officers saw specific instances of excessive drinking and adverse effects on performance, and plaintiff's drinking was a topic of discussions in the company. Four directors asked plaintiff in early April about his drinking problem and shortly thereafter the Chairman told him he was not a fit man to run the company, and he was obliged to resign. His physical appearance was "alcoholic". He drowsed at directors' meetings. He drank before work at home, drank at lunch, spent a lot of time away from the office the last month or so, and drank in the evenings before and after dinner. He was on May 7th about to (and did) sign off a $20,000 annual pension for a pittance. And he was the company leader, supposed to handle his position effectively all of the time!

If defendant had any reason to find no disability, what was it? That a doctor finding an enlarged liver and seeing the elevated test results of a chronic alcoholic might possibly say he's not drinking enough to incapacitate him from functioning all the time? (Is that the standard for the president?) That "once a month" directors didn't see the adverse effects on his day-to-day work (and didn't inquire either)? That he came to work every morning (like the alcoholic file clerk)? That he didn't clearly say, "I'm sick" or "Help me", or "Get a doctor"? That, like a typical alcoholic, he may have said, "I can control it" (in the face of manifestations that he couldn't)? Plaintiff simply is unaware of any reason on which defendant in good faith could have denied a pension for his incapacitating disease, even under a voluntary plan. The moral stigma alcoholism used to have (?) is the most likely answer.

III. The Court erred in applying New York law rather than the better law of the forum.

Aside from applying to plaintiff a harsh dictum which both runs counter to the trend of authority and violates the contract, the trial judge said that he was free to apply *Mathews*

because choice of law required the law of Rhode Island and there was none. (TR 281) However, the forum in this diversity case was Connecticut, and Connecticut had substantial contacts with the pension contract itself, Although plaintiff negotiated with defendant's Board in Providence and while the confirming letters (Exh. 1 and 2) were later written to him there, the employment and pension agreement was made while he was still living and working in Connecticut. Furthermore, the contract in question concerned a pension *upon retirement*, whether regular or disability. Retirement was unlikely to have its "beneficial effect" in Rhode Island, but rather in plaintiff's home state for decades, Connecticut, to which in fact he did return shortly after termination.

> ". . . a liability arising out of a contract depends upon the law of the place of contract unless the contract is to be performed, or to have its beneficial operation in effect, elsewhere."
>
> *Graham v. Wilkins*, 145 Conn. 34, 40, 138 A.2d 705 (1958) ; 16 *Am. Jur.* 2d, Conflicts §§ 40, 50.

A federal court in a diversity case is governed by conflict of laws rules in the state in which it sits. *Hausman v. Buckley*, 299 F.2d 655 (2nd Cir) ; *cert. den.* 369 U.S. 885 (1962) ; 20 *Am. Jur.* 2d, Courts § 220. While a federal court only applies the "substantive" law of the forum, *Erie Ry. Co. v. Tompkins*, 304 U.S. 64 (1938), the "outcome determinative" test means any state rule should be followed which would likely affect the outcome in a significant way. 20 *Am. Jur.* 2d, Courts §§ 207, 209. In view of the foregoing authority, a Connecticut court would likely apply its law, especially where Rhode Island law doesn't exist.[3] Consequently, the district court should have

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[3]The question of whether a Connecticut court would, in the first instance, apply its own law rather than the law of Rhode Island is not entirely clear. See *Republic Systems & Programming, Inc. v. Computer Assistance, Inc.*, 440 F.2d 996, 997-8 (2nd Cir., 1971) (Medina, J., dissenting). Even if a Connecticut court did look, in the first instance, to Rhode Island decisions, it would find no authority directly in point and would be free to seek guidance elsewhere. Since it presumably would find Connecticut authority persuasive, the question of whether it would look to Rhode Island law first is somewhat academic.

applied Connecticut law in this case, which happens to be fair and arise in a closely similar case (TR 188):

> "A board of directors cannot legally strip an employee of the benefits of a pension plan where the employee has complied with the terms of an offer of a pension, since the purposes of the plan could be readily frustrated at the whim of the directors (citing two cases including *Wilson v. Rudolph Wurlitzer Co., supra*). Even where an employer declares the plan is within the absolute discretion of the directors, the court will interpret the plan as a whole to give effect to its general purpose in securing the loyalty and continued service of employees, and the employer may not defeat the employee's reasonable expectations of receiving the promised reward."
>
> *Bird v. Connecticut Power Co.*, 144 Conn. 456, 463, 33 A.2d 894 (1957); *cf. Ellis v. Emhart Mfg. Co.*, 150 Conn. 501, 505; 191 A.2d 546 (1963 — option plan).

In the *Bird* case, the supplementary pension benefits were entirely voluntary and reviewed by a "so-called pension committee" of officials. The court said the vital question was whether plaintiff resigned early because of a physical or mental disability, and went on to hold that his later disclosed criminal conduct superseded any such condition and thus that he was not entitled to benefits. The essential facts and plan are similar to those in the instant case, except here there is no criminal or other misconduct. Even if any discretion remained in defendant or its pension board in view of the bargained for rights to defendant's pension plan, there was not even an attempt to exercise it in this case — a failure which defeated plaintiff's reasonable expectations.

Thus under Connecticut law, a company with even such a disability plan could not act in a way to defeat an employee's "reasonable expectations". Plaintiff's situation is much stronger because he had a contract for a pension which became binding once he changed jobs in reliance on it — and which thereafter also operated to secure his continuing service and loyalty. On either or both scores and under general contract principles, plaintiff obtained *rights to any terms or parts of defendant's pension plan which applied to his situation at the time his employment ended.* If he were then physically or

mentally incapacitated from continuing his position as president, he was entitled to his disability pension — even if there were reasons for his discharge, other than willful or criminal conduct.

Any discretion in defendant's Board implied by the word "may" is therefore limited to discretion that does not undermine the fair import of the contract. This sensible claim also comports with the Rhode Island case of *Hanaford v. Steven & Co., supra.* The *Mathews* standard as applied by the court below renders plaintiff's bargained for rights *illusory.* Defendant under traditional and modern contract principles should not be permitted to escape the consequences of its bargain. *cf. Osborne v. Locke Steel Chain Co.,* 153 Conn. 527, 531-33, 218 A.2d 526 (1966); *Dockery v. Greenfield,* 86 R.I. 464; 136 A.2d 682 (1958). "May" can only mean that plaintiff would have to furnish some evidence that he was both ill and incapacitated, and that if the defendant had any reasonable question on either point, it would try to obtain countervailing evidence — its own doctor as to illness and other employees as to adverse effect on job capacity. To avoid breaching the contract, however, defendant *had the duty* to determine lack of capacity based on reasonable grounds after investigation and unbiased consideration of whatever evidence was reasonably available to it.

Defendant did not come close to doing that or attempting to fulfill its contract. It did not ask for medical evidence and it did not cause its own doctor to examine the plaintiff. Its directors didn't consult numerous high employees who well knew of the problem. Several directors at least knew of a drinking problem and drowsing in directors' meetings, yet they didn't even try to determine the extent of the problem from a medical viewpoint or to rehabilitate plaintiff. Unless base motives are attributed to the directors, the inference is strong that they indeed considered the president to be incapacitated to some significant degree by drinking, but believed at the time that alcoholism was not an illness and/or that defendant had no contractual duty to plaintiff. If, however, they realized plaintiff probably had a disability claim, then their actions were in very bad faith, and probably even

fraudulent when the circumstances surrounding the release are considered. In spite of defendant's knowledge of a problem with alcohol affecting performance, defendant didn't fairly investigate or evaluate whether plaintiff should have a disability pension. Under the circumstances, this inaction alone, and certainly in combination with the inference that the timing of plaintiff's firing *was a determination of incapacity*, amounted to a breach of the contract.

Suppose plaintiff had had difficulty concentrating, or dizziness, or forgetfulness with no apparent medical reason, and had resigned without pension. Suppose further that two months later his condition worsened and a brain tumor was discovered by doctors who opined that the tumor caused the problems but was too small or so hidden at the earlier time to be detected. Plaintiff would be entitled to a pension even though defendant had no notice of a disability when he resigned. Plaintiff's actual case is stronger: defendant knew of a problem and its manifestations on plaintiff's work, and a medical diagnosis existed before termination. Plaintiff was not in a condition at the time of termination to effectively protect his rights; but defendant had the knowledge then to act responsibly. It was not later unexpectedly faced with an after-inspired, after-documented claim, and its plan does not require a formal application by an employee.

Plaintiff's case is essentially very simple, and it applies under contract principles even if this Court disagrees that Connecticut law applies: 1) For good consideration plaintiff obtained a contract for a pension; 2) Defendant had no discretion under that contract that could destroy its obligation; 3) Once defendant later had knowledge of an illness, it had to investigate honestly and determine fairly if it were incapacitating; 4) Defendant's failure to do so and/or to act on the basis of the evidence, removed whatever little discretion it possessed, or constituted an arbitrary or bad faith exercise of discretion; 5) Under the circumstances the termination constituted a determination of incapacity; and 6) Thus the failure to furnish a disability pension was a breach of contract. (Even if defendant had no knowledge by May 7, 1968, its later acquisition of evidence that plaintiff was probably in-

capacitated by such date should also entitle plaintiff to his right to a disability pension.)

In short, plaintiff had a contract, was wrongfully denied its benefits, and has now solidly proven all the elements to show his pension was improperly withheld. If the illness were other than alcoholism, the correctness of his claim and the validity of his contract would be immediately perceived. Yet in 1966 the Fourth Circuit noted that alcoholism was almost universally accepted medically as a disease. *Driver v. Hinnant*, 356 F.2d 761. The Internal Revenue Service took more time but ruled on November 11, 1974 that alcoholism is a sickness within the sick pay exclusion of the Code. Rev. Rul. 74-542.

IV. The Court erred in directing a verdict for defendant on its defense of release by viewing plaintiff's evidence unfavorably, by choosing the wrong governing law, and by requiring plaintiff in his direct case to disprove a special defense.

a. *Again, evidence and inferences favorable to plaintiff were not used:* Plaintiff's alleged release of valuable pension rights creates not only an inference of greatly diminished business capacity at the time, but also an inference that defendant took improper advantage of his weakened condition or state of intoxication. The issue of disability otherwise overlaps the issue of the "release" (App. 2a). If this Court agrees with plaintiff as to disability, then it should also agree that the directed verdict on the alternative ground of release was erroneous, and that the circumstances indicated defendant's bad faith. In any event, one must consider the circumstances surrounding the release in the total context of plaintiff's condition and defendant's knowledge before May 7, 1968, rather than only what was said and done on that day — the limited approach taken by the trial court.

Keeping in mind the evidence of condition and capacity already stated, it is important to consider two actions of the Board revealed in the May 7, 1968 minutes (Exh. 7): first, Mr. Wyper's resignation as director was accepted which implied that Exhibit 4 was prepared and signed *before* the meeting; and then,

> "Voted — that James Wyper, Jr. be paid severance pay in an amount equal to his regular salary through July 1968 provided he executes a release as prepared by Mr. Branch,"

implied that the preparation and execution of the release were to take place *after* the meeting. The latter also strongly implies that Mr. Wyper would be out on the street with no severance pay at all (he had no right to it) unless he signed the release.

After defendant's motion for directed verdict, plaintiff was allowed to reopen his case and obliged to then offer further evidence about the release, as will be discussed later. He had to call Mr. Branch as a witness. Branch said the resignation may have been signed by plaintiff before the directors' meeting, the release, he was certain, after. He drafted both letters the day before, although they may not have been typed until the 7th. But then he couldn't remember whether they were signed at the same or different times. (TR 201-2) He thought he had prepared the release prior to the meeting but wasn't sure. (TR 205) Wyper served at the pleasure of the board and once he was terminated he was not entitled to salary. As to the meaning of "any other matter" in the release, this covered life insurance and any fringe benefits. (TR 209-10) Mr. Wyper's pension would have involved a substantial sum of money. Plaintiff was not entitled to a pension on account of age. (TR 217) He was not entitled to a pension for mental or physical incapacity. Mr. Branch did not include the word "pension" in the release because he wanted the clause to include everything; he didn't think it necessary. (TR 219-21)

A reasonable inference from the specific mention in the release of salary to which there was no right and of severance pay which was otherwise already covered and from the absence of any specific mention in the release of the most valuable pension, is that Mr. Branch didn't want to bring Mr. Wyper's attention to any relinquishment of a pension. The inference of intentional secretiveness is furthered by defendant's keeping of the "release" — "Additionally, there is the release — which incidentally, the attorneys [for plaintiff] may not know

we possess" (Confidential internal memo of *June 1972* from the president, Exh. 8). Lastly defendant admitted in paragraph 12 of the complaint that "it will evaluate his rights [to a pension] when he reaches age 65"; and this strongly implies that the release didn't cover a regular retirement pension at all. Thus, absent specificity, it should not cover only a "disability" pension.

As to May 7th, Mr. Wyper said he drank before he left for work, and two martinis in his office in the middle of the morning. After the stockholders' and directors' meetings, he went to his office and took a few drinks (three) of whiskey. He became partially intoxicated; he didn't know what happened afterwards. He doesn't remember reading or signing letters of resignation or release. For at least two months it had been necessary for him to have some alcohol to function at all on the job. (TR 222-6) He never intended or thought he was releasing pension rights. He did not become aware of the release letter until after this suit was started. (TR 228-9) As to why he didn't make his claim sooner after he left defendant, he was mentally disturbed and was an alcoholic and in and out of various hospitals for years. (TR 242-4) Mrs. Wyper said plaintiff was drinking heavily in the period prior to the May 7th meeting. He had two drinks in the morning; when he came home he was in bad condition, had been drinking heavily and was especially depressed. Towards the end of his employment he had to drink to function at all. If he then had more to drink, he could get quickly intoxicated. (TR 247-51)

Plaintiff then rested his reopened case and defendant called Mr. Branch, who retailored his testimony on the release. On direct, he said he was in Wyper's office a "very few minutes" after the meeting "having him sign those papers". The release was already prepared. "I told him that we were willing to give him three months separation pay if he would give us what was, in effect, a general release." He talked "perfectly normally, was competent to understand and signed those two documents in his office" in Branch's presence. (TR 263-5) On cross, he testified inconsistently with prior testimony as to

when the letters were signed. Prior to May 7t there were informal meetings with the Board that Wyper should resign, but no top officers (other than Carr?) were consulted. (TR 268-9) He could not recall *any* prior discussion with Wyper about severance pay — until after the May 7th meeting. If Wyper hadn't resigned, he would not have been reelected. (TR 271-2) One director told Branch Wyper was drowsing at meetings, and that several directors talked to him of a drinking problem. This was McLeod in early April. (TR 274-7) Now, Branch was a witness who had served as director since 1933 and Chairman for a long time, was obviously loyal to defendant, and instrumental in plaintiff's termination. Aside from bias, he had given inconsistent testimony *and* for the first time admitted to knowledge *of directors* of Wyper's drowsing at meetings and of a drinking problem. In effect defendant's first witness helped plaintiff. Only moments later, however, the court was rendering an oral opinion against plaintiff. (TR 278) The circumstances of the release and the conflicting testimony about aspects of it, especially plaintiff's mental state, were clearly in the province of the jury.

b. *Court's use of inapplicable Connecticut law:* The court very briefly said there was insufficient evidence to justify any finding of an intent to exclude any pension from the release. (TR 281) This overlooks Mr. Wyper's own testimony, as well as the inferences to be drawn (a) from the failure to specifically mention the important pension while listing two unimportant or unnecessary matters in the release, and (b) from the lack of reason to include the pension because Wyper was not 65 and was not, according to Mr. Branch who prepared the release, entitled to a disability pension anyway. One party cannot release a right when he says he didn't intend it, and the other party says the first party didn't have the right in the first place; this constitutes mutuality of agreement that the matter was *not* included in the release contract.

The court spent much more time, and made a defendant's argument, in disposing of plaintiff's attempt to avoid the release due to intoxication. (TR 282-4) The court accepted the testimony of the biased defense witness Mr. Branch, speculated

on plaintiff's condition and forgetfulness, and utilized a harsh, outdated, but this time Connecticut case, *Caulkins v. Fry*, 35 Conn. 170 (1868). Factually that case is distinguishable in three major respects. It involved only temporary intoxication claimed when defendant signed a promissory note, not a whole history of alcoholism affecting capacity over period of time. Secondly, defendant immediately acted the next day to avoid the note; yet here plaintiff remained in the clutches of alcoholism, and only years later was informed of the release, about which defendant was very secretive. Thirdly, *Caulkins* had none of the contractual relationship, employer-employee relationship, or coercive, unfair conduct by defendant which surrounds the release in this case. (And actually, the judge went on to rely more on the alternate ground that plaintiff had not proved that Mr. Branch was aware he was intoxicated and unable to understand, which involves total acceptance of Mr. Branch's testimony and overlooking his awareness of a drinking problem and Wyper's "alcoholic" look).

c. *Rhode Island law applies to release:* Again the court has curiously chosen the wrong law. If it considered Rhode Island law (if it had existed) applied to plaintiff's pension claim, then *a fortiori*, Rhode Island, not Connecticut, law applied to the release contract clearly entered in Providence. 16 *Am. Jur.* 2d Conflicts 77. In Rhode Island a release is to be construed from the standpoint of the parties at the time of its execution, and evidence is admissable to show the surrounding circumstances for that purpose. *Swinburne v. Swinburne*, 36 R.I. 255, 90 Atl. 121 (1914) One of the circumstances a jury is to consider is the adequacy of the amount. *Clark v. New York, N. H. & Hartford Ry. Co.*, 35 R.I. 479, 87 Atl. 206 (1913 — passenger suffering personal injuries claimed mental incapacity when release obtained). A party cannot avoid a release on the grounds of impaired understanding where the other party had no knowledge of her incapacity *unless her condition at the time rendered her unable to understand the effects of the contract. Cooney v. Lincoln*, 21 R.I. 246, 42 Atl. 867 (1899, when this was also fair and the parties could not be restored to their former condition — Wyper's situation is

different and underlined language, though still harsh, supports his position). Any ambiguity in a release is to be resolved against the party who drew it. *LaBelle v. Di Stephano*, 85 R.I. 359, 131 A.2d 814 (1957).

d. *The wrong burden of proof was placed on plaintiff at the wrong time:* Whether substantive law of Rhode Island or Connecticut applies, a federal court in a diversity case should follow the law of the forum as to burden of proof. 20 *Am. Jur.* 2d Courts 219; Anno. 128 ALR 405; and Anno. 10 ALR Fed. 451, 464 (on sufficiency of evidence). Under Section 120 of the Connecticut Practice Book, defendant was required to plead release as a special defense. Defendant actually did set up release and resignation signed by plaintiff as special defenses. It would clearly follow that defendant assumed the burden of proving its special defenses, *including their voluntariness*, by a preponderance of evidence. *cf. DuBose v. Carabetta*, 161 Conn. 254, 267, 287 A.2d 357 (1971), *Collens v. New Haven Water Co.*, 155 Conn. 477, 493-5, 234 A.2d 825 (1967).

Plaintiff's grounds for avoiding the release do not shift to him defendant's burden of proof of its defenses; but, even assuming *arguendo* that plaintiff had the burden of showing involuntariness, an assessment of his proof could not come until the close of the whole case, i.e. until the end of plaintiff's rebuttal of defense evidence. Here apparently, because the release was in evidence as part of the cross-examination of plaintiff who admitted the signature was his, the court obliged plaintiff to assume the burden of showing an involuntary or incomplete release as part of his direct case. Understandably therefore, plaintiff found himself in the strange position of being allowed to reopen his direct case to present evidence of involuntary release in order to avoid a directed verdict, but "objecting" on the grounds that normal trial procedure should be followed and that his proof in avoidance of the release need not come until conclusion of defendant's case. (TR 190-6) The discretion of the court to control the trial should not extend to changing the normal progress of proof to require rebuttal of a defense as part of plaintiff's case in chief.

V. The Court erred in not even considering another ground for avoiding the release — the unfair advantage taken of an employee's mental weakness.

Plaintiff had a ground of release avoidance that was more substantial than intoxication on the day of signing, which the court overlooked. This ground was clearly stated in his request for jury instructions (4b in part, R. 31):

> "The release may also be avoided by plaintiff if you find defendant took unfair advantage of his necessities or distress. 20 ALR 2d 743, 747; 66 *Am. Jur.* 2d, Release §§ 3, 14, 17, 26."

Although the relationship between employer and employee is not usually described as a fiduciary one, the parties do not stand on equal footing. Careful scrutiny should be given to a release signed by a person who, like plaintiff, was at least suffering from alcoholism, of weakened mental capacity at times, depressed over having to resign his good job — and perhaps over the prospects of another job and over himself, and who was also that very day confronted with the likelihood of no severance pay at all if he didn't sign the release placed under his nose. The Chairman didn't even see fit to point out to Wyper that he was giving up a pension — his only "vested" right, especially when that pension involved $20,000 a year for years into the future (a factor plaintiff also claimed in request to charge 4c the jury should consider). Plaintiff is surprised the judge would not see the unfairness and overreaching of the surrounding circumstances and at least put this situation to a jury, rather than decree there had to be clear proof of complete intoxication known to the other party. One can reasonably surmise that, even if Mr. Wyper did not do any drinking after the meeting and even if Mr. Branch told him that the release included his pension, Wyper's condition, his needs, his will-power, his ability to protect his own long-range interests were such *at that moment* that he would still have signed Exhibit A. But it is not fair or just that such an advantage can be taken by an iron-willed Mr. Branch, and so much given up by an ill person, under such circumstances, *in a few moments*. It is even more inequitable that a jury

could not even apply its collective wisdom to this matter. But then, alcoholics are "losers" in the eyes of many, even those who try to acknowledge that alcoholism is a disease.

Anno. 20 ALR 2d 743 contains no pointed Rhode Island or Connecticut cases. Even if the law of the latter applies to the release because the pension transaction is governed by Connecticut law, there is case law in analogous *contract-based* situations which should cause state courts to be sympathetic to the employee's avoidance of a momentary write-off of a whole financial future (here, a future that money might have helped salvage).

As long ago as 1795 in Connecticut, there could be relief from a bargain in which unconscionable advantage was taken of another's natural weakness and incapacity, increased by intemperance. *Whipple v. McClure*, 2 Root 216. Where grantor had long been intemperate and was ignorant of his inheritance, and the grantee misinformed him and played on his fears, and got for only $1,000 property worth $7,000, the conveyance was set aside. *Lavette v. Sage*, 29 Conn. 77 (1861). Contracts of a person of weak understanding would be set aside if he had not exercised deliberate judgment but has been imposed upon. *Taylor v. Atwood*, 47 Conn. 498 (1880). Whether a contract is the result of duress depends not so much upon the means of execution of the contract but the state of mind induced by the means employed. *McCarthy v. Tanska*, 84 Conn. 377, 80 Atl. 84 (1911). (These cases are all more apposite than the temporary incomplete intoxication of *Caulkins v. Fry, supra.*) Even a unilateral mistake, a computational error, not induced by other party may be grounds for cancellation, where the latter tries to take unconscionable advantage of a contract for one-third less than the estimate. *Geremia v. Boyarsky*, 107 Conn. 387; 140 Atl. 749 (1928). In the absence of fraud or coercion, the adequacy of the consideration paid is of no consequence, but gross or shocking inadequacy may be a badge of fraud or tend to establish constructive fraud, and is in any event a circumstance to be considered. *Ross v. Koenig*, 129 Conn. 403, 406-7; 28 A.2d 875 (1942). And a release will be interpreted strongly against

the party drawing it. *Modern Auto Finance Corp. v. Preston*, 2 Conn. Cir. 492, 202 A.2d 845 (1964).

The advantage defendant has taken in the unspecific release its Chairman prepared is, by itself, stupendous: $10,000 in release of $20,000 a year by a man only age 50! This, together with other circumstances of mental condition, impaired judgment, and no alternative to resignation, add up to monumental bad faith, overreaching, and indeed fraud. Mr. Branch, with the concurrence of the rest of the Board, really overcame the weakened alcoholic — who may actually have also been intoxicated at the time.

VI. The direction of a verdict for defendant during its case was prejudicial to plaintiff and thus erroneous.

In directing a verdict for defendant at the conclusion of Mr. Branch, the first defense witness, the court relied on *Panotex Pipe Line Company v. Phillips Petroleum Co.*, 457 F.2d 1279, 1283 (5th Cir.); *cert. den.* 408 U.S. 485 (1972); but the question "is one of orderly procedure in the frame of reference of trial court's discretion, procedural due process, and fair trial". Unlike that case, however, those elements were abused here, and plaintiff was prejudiced. Specifically, plaintiff had every reasonable expectation of getting *further* helpful testimony from two of defendant's witnesses, whom he did not want to call as his witnesses, but was waiting for a chance to cross-examine. Defendant's supplemental statement (R. 30) containing a summary of the expected testimony of its witnesses contained two sentences, the assistance of which to what plaintiff was trying to uncover needs no elaboration:

> "John Coffey is expected to testify that he was a director throughout the period of time involved — that he had noticed the plaintiff apparently dozing at one or more Directors' meetings and had mentioned this to the plaintiff who responded that he was on some type of medication that caused drowsiness - - that at another meeting in Coffey's office the plaintiff was asked if he had a drinking problem and the plaintiff indicated he did not."
>
> "Margaret Gilhooley is expected to testify she was the plaintiff's personal secretary throughout his stay . . . that

> she was aware of some drinking by reason of odor of liquor on his breath . . . During the last six weeks of his tenure there were occasions when he would return from lunch, close the door to his private office, and not answer the telephone."

A verdict was not directed at the close of plaintiff's case. Mr. Branch's testimony then was, as shown, potentially helpful to plaintiff, especially his inconsistencies and his admission of hearing from Director McLeod what Coffey was going to testify to. Plaintiff expected to nail his case down, if it needed further nailing, by searching the above quoted statements. Plaintiff reasonably anticipated completely exposing the cover-up in which defendant's loyal directors and employees were engaging in order to keep plaintiff from what was rightfully his. The judge, in an unusual procedural decision, further unfairly prevented a strong case from being further strengthened.[4] F.R.C.P. 50(a) was violated.

CONCLUSION

For the foregoing reasons, the Court erred in directing a verdict and preventing a strong case of breach of contract and overreaching from being decided by a jury. Accordingly, the judgment should be reversed and a new trial ordered. Plaintiff further asks this Court to set the choice of law and burden of proof standards to be applied, as well as indicating the rule of contract law and of defendant's discretion, if any, to be utilized in a fair resolution of this matter before a jury on retrial.

Respectfully submitted,

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[4]Indeed, since defendant's list of witnesses did not contain the name of a single *officer*, one must wonder how defendant could have contradicted the three former officers who testified for plaintiff on the only conceivable remaining issue — the extent of alcoholic incapacity.

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF CONNECTICUT

JAMES WYPER, JR.	:	
VS.	:	75-7347
PROVIDENCE WASHINGTON INSURANCE COMPANY	:	

CERTIFICATE OF SERVICE

I hereby certify that by September 25, 1975 I will have hand-delivered three (3) copies of Plaintiff's Brief in the above entitled matter to George Muir, Esquire, Attorney for Defendant.

Paul W. Orth, Esquire

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